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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-921

NEWPORT ASSOCIATES, INC.,

Petitioner,

against

SHELDON H. SOLOW,

Respondent.

PETITION FOR REHEARING

LEO BRADY
Counsel for Petitioner
100 East 42nd Street
New York, New York 10017

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This is a petition for rehearing of the petition for a writ of certiorari in the above entitled case. (Petition for writ was denied on February 20, 1973.)

We respectfully submit that our position was not made clear to this Court and point to a recent decision of the Appellate Division of the Supreme Court of the State of New York and an article by the counsel for the New York City Department of City Planning, both relating to the Zoning Resolution in question. In the recent case of *Lefrak Forest Hills Corp.* v. *Galvin et al.*, and *Franklin National Bank* v. *Galvin et al.*, 40 App. Div. 2d 211, December 26, 1972, the Court had occasion to review another provision of the same Zoning Resolution involved in the instant case. In discussing the matter the Court at p. 213 held that the denial of a building permit or the transfer thereof in that case would, in effect, deprive the petitioner of air rights which had previously vested, citing *Matter of Weinrib* v. *Weisler, et al.*, 33 App. Div. 2d 923, 27 N.Y. 2d 592, wherein

that Court held unconstitutional an ordinance which affected vested rights acquired prior thereto. In the *Lefrak* case the new Zoning Resolution narrowed for the future the owner's right to build upon his property. However, the right to build to the extent permitted under the old ordinance was extended for a period of years. The dissent thought that ten years was long enough and further extension was unwarranted.

In the instant case the Court by interpreting the Zoning Resolution as having retroactive application has deprived petitioner of rights which had been vested for years. In the *Lefrak* case the Court interpreted the new law to protect vested rights; here the Court applied the new law to deprive petitioner of vested rights.

In Law and Contemporary Problems (LCP), Vol. 36, p. 372, "Air Rights Transfers in New York City" counsel for the Department of City Planning, City of New York, referred to the instant case. He wrote (p. 373, fn. 5) "Apparently not anticipated were situations created by a default under the lease after the leased parcel had been stripped of its air rights potential by a new structure on a contiguous portion of the new zoning lot. A recent case raised the fundamental question of the automatic operation of the transfer principle by the Zoning Resolution where the parties to the lease evidenced no intention to achieve that result." (Citing the Appellate Division decision in this case, 36 App. Div. 2d 519, 317 NYS 2d 715.) Counsel for the Department of City Planning noted what both the Appellate Division and the Court of Appeals of the State of New York held, namely, that the lease in question did not grant respondent the right to use the FAR. That right belonged to the petitioner; it was part of his bundle of property rights. It was that vested right, however, which the New York Court of Appeals held could be taken away from the petitioner by virtue of the retroactive application of the Zoning Resolution.

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Incidentally, petitioner has never had a trial; the matter was disposed of by summary judgment. In the light of its historial treatment of zoning problems, apart from the law, the City authorities would have to admit on examination that the Zoning Resolution in question had application only to leases executed after the effective date thereof, December 15, 1961, which was one year after its enactment, and was not applicable to theretofore existing leases.

Prior to the effective date of the Zoning Resolution 12-10 in December 1961, petitioner owned the air rights over the property theretofore leased in 1953. The lease executed in 1953 did not grant away the air rights, FAR. Landlord-lessor retained such rights. Although the Court of Appeals ruled that the lease provision relied upon by respondent conferred no rights upon him, it nevertheless held that somehow the combination of his fee ownership of the adjacent property, the lease in question and the Zoning Resolution made three zeros amount to something.

Judge Breitel pointed out the need to reserve air rights in a long-term lease. That precaution would apply to leases executed after 1961, for the Zoning Resolution affected property rights and changed the law as to the future. However, by the settled law prior to Zoning Resolution 12-10 petitioner's vested rights were preserved; in 1953 there was no more need to reserve air rights than to reserve rights of reversion.

An act which is lawful when done may not thereafter be made a crime; similarly, rights which have vested may not thereafter be taken away, either by an individual or the state. The Court of Appeals has never said in this case that it meant to overrule the established principles of real property law or to deprive a citizen of his constitutional rights.

Respondent's brief in opposition to the petition for certiorari, page 4, stated that there was no question of

importance to the public as distinguished from the parties. We respectfully submit that the principle involved in the instant case is one of the most important in the whole field of constitutional law—whether rights, property or civil, may be retroactively taken away from the citizen.

We submit that Respondent cannot fairly or satisfactorily answer the questions which must have arisen in the minds of the Court. We believe that his answers will expose the unconstitutional base on which his case rests.

For the foregoing reasons this petition for a rehearing should be granted.

Respectfully submitted,

LEO BRADY
Counsel for the Petitioner

Certificate of Counsel

This petition is presented in good faith and not for delay. Respondent cannot be in any respect delayed by this petition; the Court of Appeals was informed by his counsel more than a year ago that the building was practically completed. We also certify that the petition is restricted to the grounds set forth herein.

March 13, 1973

LEO BRADY